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IN THE
Supreme Court of the United States

ABIGAIL NOEL FISHER,
Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* THE AMERICAN JEWISH COMMITTEE, UNION FOR REFORM JUDAISM, CENTRAL CONFERENCE OF AMERICAN RABBIS, AND WOMEN OF REFORM JUDAISM IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

The American Jewish Committee ("AJC") is a non-partisan, not-for-profit advocacy and human-relations organization. It was established in 1906 to protect the civil and religious rights of Jews. More than one-hundred years later, AJC now has roughly 170,000 members and supporters, and 22 regional offices, spread across the nation and throughout the world.

AJC recognizes that the best defense against anti-Semitism and other forms of bigotry is to promote mutual understanding and acceptance through interactions between peoples of diverse ethnic, national, racial, and religious backgrounds. Through its Arthur and Rochelle Belfer Center for American Pluralism, AJC draws on historical Jewish-American experiences to facilitate cross-cultural and cross-racial interactions that advance the principles of democracy, pluralism, diversity, and civic engagement. In practice, AJC has advanced these principles for decades by advocating on behalf of civil rights and civil liberties for people of all backgrounds. For example, AJC sponsored the study demonstrating the psychological impact of prejudice and discrimination on children cited by this Court in its landmark *Brown v. Board of Education* decision.[2]

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[1] No counsel for any party has written this brief in whole or in part. This brief was prepared entirely by AJC's counsel on a *pro bono* basis; no other person made any monetary contribution to this brief. *See* Sup. Ct. R. 37.6. All parties have consented to the filing of this brief through universal letters of consent on file with the Clerk of the Court.

2 *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 n.11 (1954) (citing K. B. Clark, *Effect of Prejudice and Discrimination on*

In the context of admissions in higher education, AJC has long recognized the importance of evaluating each applicant holistically as an individual, rather than making prejudgments based solely on his or her race, religion, color, or creed. For this reason, AJC filed *amicus curiae* briefs in *DeFunis v. University of Washington Law School* and *Regents of the University of California v. Bakke* opposing those institutions' separate admissions systems for minorities, which evoked the admission quotas used to restrict Jewish matriculation to colleges and universities in the earlier part of the Twentieth Century. Such quotas were born of bigotry, and AJC staunchly opposes any admissions system that similarly depends on predeterminations about the proper racial or ethnic composition of college and university campuses.

In 2003, AJC filed an *amicus curiae* brief in *Grutter v. Bollinger* in support of the University of Michigan Law School's efforts to achieve diversity in its student body, which did not discriminate against or grant a quantifiable preference to any race, but instead encouraged diversity through individualized, flexible analysis of each candidate. This Court sustained the University of Michigan Law School's policy and confirmed the importance of diversity in higher education in order to provide students with a richer educational experience and to better prepare them to participate as citizens in our pluralistic democracy. *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003). AJC also filed an *amicus curiae* brief in the

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Personality Development (Mid-century White House Conference on Children and Youth, 1950).

Court's 2011 consideration of the present case, urging the Court to reaffirm the holding of *Grutter v. Bollinger* and continue to acknowledge the important social and education benefits of policies like the one University of Texas at Austin has adopted.

Central to AJC's organizational mission is building coalitions across diverse religious, ethnic, and racial groups. AJC's ability to fulfill its mission depends greatly on diversity in colleges and universities. Without diversity in higher education, which exposes individuals at a still-impressionable stage in life to differing viewpoints and backgrounds, organizations like AJC would be limited in their ability to foster relationships and build broad-based coalitions among the diverse citizens of our great Nation. AJC thus believes that it is imperative to reaffirm the twin holdings announced in *Grutter* and reaffirmed in *Fisher I* and reject any invitation to abandon educational diversity as a compelling state interest or to invalidate holistic admissions programs by subjecting them to impossible standards.

The Union for Reform Judaism, whose 900 congregations across North America includes 1.5 million Reform Jews, the Central Conference of American Rabbis (CCAR), whose membership includes more than 2,000 Reform rabbis, and the Women of Reform Judaism that represents more than 65,000 women in nearly 500 women's groups in North America and around the world share a deep commitment to the prophetic imperatives of our tradition and the creation of justice for all the people of our country. We have held that affirmative action aimed at correcting historic injustice in our society is a significant and successful vehicle for achieving

such a goal. We have held that race conscious remedies that use goals and timetables as opposed to quotas, which led to our support for affirmative action programs ranging from those in the *DeFunis* and *Bakke* cases to those in the *Grutter* case, are moral and effective means of addressing the impact of historic discrimination. We are particularly sensitive to the dangers that we face in a society where inequity is allowed to persist. The long-range interests of all Americans are best served by the creation of a society that is truly just. Affirmative action fosters vibrant diversity and the full participation of minorities in all important aspects of society.

SUMMARY OF ARGUMENT

In its previous consideration of this case, *Fisher v. University of Texas at Austin, et al.*, 133 S. Ct. 2411 (2013) (*Fisher I*), the Court reaffirmed its precedent outlining constitutionally permissible race-conscious university admissions policies, *Grutter v. Bollinger*, which was a continuation of the principles announced in *Regents of University of California v. Bakke*. Indeed, the diverse demographic composition of the United States makes it imperative for colleges and universities to create pluralistic campuses that will expose their students to an array of qualities and experiences, and differing viewpoints and values. Diversity in higher education is of vital importance not only to schools themselves, but also to our society, given the critical impact education has in shaping students to become fully involved and engaged citizens and, in many instances, leaders of our institutions and our country.

The *amici* therefore request that this Court once again reaffirm the central tenet of *Grutter* that colleges and universities may endeavor to achieve educational diversity through admissions policies that consider ***all*** qualities of each individual applicant. Such policies do not discriminate or provide preferential treatment based on race alone, but instead acknowledge the reality that race and culture inherently play some role in shaping an applicant's life experience and character. Overturning or unduly limiting *Grutter* would force academic institutions to turn a blind eye to important qualities that are often central to a student's experiences and education.

While it is important that impermissible, inflexible racial quotas are cast aside, as this Court held in *Grutter* and reaffirmed in *Fisher I*, there is nothing unconstitutional about a race-conscious admissions policy that seeks to attain educational diversity through individualized, case-by-case admissions decisions without resort to a numerical quota, racial balancing, or the unbounded discretion of school administrators. The record demonstrates that the University of Texas at Austin (the "University of Texas" or "UT") implements such a limited and individualized admissions policy that is directly in line with the type of admissions policy this Court sanctioned in *Grutter* and *Fisher I*.

As social science research and the previous thirty years of college admissions confirm, admissions policies such as the one at issue in this case provide important social and educational benefits. Further research has demonstrated that the Texas "Top Ten Percent" plan and other race-neutral affirmative

action policies endorsed by Petitioner simply do not effectively enroll a diverse group of underrepresented minorities because such policies fail to account for the unique and valuable experiences *within* minority groups. Merely looking at the number of minority students admitted to determine whether a university has achieved a "critical mass" of diverse viewpoints is ultimately its own type of quota, as the Fifth Circuit appropriately noted when Petitioner made this argument below. The University's holistic review plan is a necessary component of an overall admissions program designed to fulfill UT's compelling interest in the educational benefits that flow from a diverse student body.

The *amici* request that the Court decline certain other *amici*'s overtures intended to effect a reconsideration of *Grutter*. (*See, e.g.*, Center for Individual Rights Br. 2, 7, 12; Asian American Legal Foundation Br. 37-38.) Revisiting *Grutter* now would create substantial confusion and unrest in the country's college and university admissions offices, which have relied on the principles first articulated by Justice Powell in *Bakke* more than three decades ago. It would deprive university administrators of their ability to provide their students with an enriching and diverse educational experience, and instead, force them to ignore essential qualities, challenges, and life experiences their applicants face. At the same time, invalidating this Court's guidance in *Grutter* ultimately will diminish the benefits to our pluralistic society arising from the full inclusion within the university community of students reflecting the breadth of experiences among our diverse citizenry.

ARGUMENT

I. This Court Should Reaffirm *Grutter*'s Holding That Obtaining The Benefits That Flow From Educational Diversity Is A Compelling State Interest.

Jewish leaders, institutions, and organizations have not always embraced race-conscious admissions policies. The first affirmative action programs were inflexible systems that allotted a set number of admissions slots to minority groups. Such programs were reminiscent of the bigoted numerical quota systems implemented by elite colleges and universities, including Harvard, Yale, Princeton, and Columbia, to curb Jewish enrollment during the first half of the Twentieth Century. *See, e.g.*, JEROME KARABEL, THE CHOSEN: THE HIDDEN HISTORY OF ADMISSION AND EXCLUSION AT HARVARD, YALE, AND PRINCETON, 88, 102, 130-31 (2005); DAN A. OREN, JOINING THE CLUB: A HISTORY OF JEWS AND YALE 46-47, 175-76 (1985); MARCIA GRAHAM SYNNOTT, THE HALF-OPENED DOOR: DISCRIMINATION AND ADMISSIONS AT HARVARD, YALE, AND PRINCETON, 1900-1970, 17-20 (1979).

While the Jewish quota systems were sometimes given paternalistic rationalizations, such as the supposed need to protect Jewish students on college campuses, *see* HENRY L. FEINGOLD, LEST MEMORY CEASE: FINDING MEANING IN THE AMERICAN JEWISH PAST 95 (1997), at bottom, they were rooted in anti-Semitism. They sought to exclude Jews on the basis of prejudice, and many promising Jewish students were deprived of important opportunities, despite their qualifications, simply because they were Jewish. For this reason, among others, many

members of the Jewish community, including the *amici*, have historically opposed any admissions system that resembles a quota. *See* Brief of the American Jewish Committee, et al. as Amici Curiae Supporting Respondent, *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978) (No. 76-811), 1977 WL 188015, at *11-12 (Aug. 5, 1977).

The *amici* believe that it was wrong for institutions to rigidly classify people based on race, gender, or ethnic origin. In this regard, the *amici* agree with this Court's recognition over the last thirty-five years of the invidious nature of quotas and other racial balancing systems. *See, e.g.*, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 723 (2007); *Grutter*, 539 U.S. at 330; *Freeman v. Pitts*, 503 U.S. 467, 494 (1992); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989); *Bakke*, 438 U.S. at 307. These decisions have forced a salutary recasting of affirmative-action programs.

As college and university admissions policies have evolved, so too has Jewish support for race-conscious admissions. After Justice Powell's landmark opinion in *Bakke*, colleges and universities essentially abandoned quota systems and began to implement more flexible, individualized admissions policies that considered race as only one among many aspects of an applicant's file. *See Grutter*, 539 U.S. at 323 ("Justice Powell's opinion announcing the judgment of the Court has served as the touchstone for constitutional analysis of race-conscious admissions policies."). As a result, many Jewish organizations, including the *amici*, have come to support such admissions policies, which simply reflect the reality

that, for some individuals, race is an essential component of their experience, personality, and character.

Indeed, the *amici* and other Jewish groups now recognize that flexible, race-conscious admissions policies like those at issue in this case and *Grutter* are beneficial to society because they ensure educational diversity and its attendant benefits. *See* Brief of the American Jewish Committee, et al. as Amici Curiae Supporting Respondents, *Fisher v. Univ. of Texas*, 133 S.Ct. 2411 (2013) (No. 11-345), 2012 WL 3418839; Brief of the American Jewish Committee, et al. as Amici Curiae Supporting Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241) & *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516), 2003 WL 536749 (Feb. 14, 2003). Without educational diversity, many students would be ill-equipped to serve as culturally-aware business and governmental leaders in our pluralistic society, and organizations such as the *amici* will be limited in their ability to reach people to advance cross-cultural understanding as a bulwark against bigotry.

A. Petitioner Does Not Challenge—Nor Should The Court Disrupt—the *Grutter* Decision.

As the Court acknowledged in *Fisher I*, the parties in this case did not challenge *Grutter*'s holding that obtaining the benefits that flow from educational diversity is a compelling state interest. *Fisher v. Univ. of Texas* (*Fisher I*), 133 S. Ct. 2411, 2419 ("The parties here do not ask the Court to revisit that aspect of *Grutter*'s holding [that educational diversity is a compelling state

interest]."), 2422 ("The petitioner in this case did not ask us to overrule *Grutter*'s holding that a 'compelling interest' in the educational benefits of diversity can justify racial preferences in university admissions.") (Scalia, J., concurring). Since the Court last heard this dispute, neither party has invoked a new challenge to *Grutter*. Indeed, the question certified to the Court is whether the University of Texas at Austin's use of racial preferences in undergraduate admissions can be sustained under the Court's *existing decisions* that interpret the Equal Protection Clause, including both *Grutter* and *Fisher I*, which relied on *Grutter*.

The Court should continue to stand by its *Grutter* and *Bakke* precedent as a matter of *stare decisis*. This Court frequently has noted the importance of *stare decisis* for preserving the legitimate expectations of citizens and institutions in our country. *See Dickerson v. United States*, 530 U.S. 428, 443 (2000). Overturning *Grutter* and *Bakke* would unsettle those expectations, which have yielded decades of admissions policies for a large swath of colleges and universities. *See* Akhil Amar Reed and Neal Kumar Katyal, *Bakke's Fate*, 43 U.C.L.A. L. REV. 1745, 1769 (1996) ("An entire generation of Americans has been schooled under *Bakke*-style affirmative action, with the explicit blessing of—indeed, following a how-to-do-it manual from—U.S. Reports."); *Bakke*, 438 U.S. at 287 (suggesting that any rule fashioned under the Equal Protection Clause will apply, through Title VI, to nearly every *private* school as well).

After *Bakke*, many admissions programs at colleges and universities implemented the holistic

review encouraged by Justice Powell. *See Grutter*, 539 U.S. at 323 ("Justice Powell's opinion announcing the judgment of the Court has served as the touchstone for constitutional analysis of race-conscious admissions policies."). In *Bakke*, Justice Powell extolled the virtues of the individualized admissions systems used by highly selective colleges such as Harvard and Princeton. *Bakke*, 438 U.S. at 316-19. He explained that such a program "is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant," so that a "black applicant may be examined for his potential contribution to diversity . . . with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism." *Id.* at 317.

Given the continued need for and benefits reaped from educational diversity, and the fact that neither party has urged the Court to overturn *Grutter* or *Bakke*, there is no reason to depart from these considered precedents here.

B. Diversity In Academic Institutions Provides Important Educational And Societal Benefits.

Having students from a variety of backgrounds, cultures, and experiences enhances the learning within an undergraduate setting. Justice Powell said it well in *Bakke*: "The atmosphere of speculation, experiment and creation—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body." *Bakke*, 438 U.S. at 312 (opinion of Powell, J.) (citation and internal quotation marks omitted). Justice Powell

acknowledged further the view that students with different racial backgrounds, religious experiences, extracurricular activities, and from different parts of the country and the world, will bring these varied experiences to campus. *Id.* at 313 (citation omitted). These students' experiences can inform the discussions inside and outside the classroom.

In fact, social science research has verified that racial diversity provides positive benefits to the collegiate educational experience, such as greater intellectual and social ability among students. *See, e.g.*, Sylvia Hurtado & Linda DeAngelo, *Linking Diversity and Civic-Minded Practices with Student Outcomes: New Evidence from National Surveys*, 98 Liberal Educ. 14, 14-16 (Spring 2012), *available at* https://heri.ucla.edu/PDFs/Linking-Diversity-and-Civic-Minded-Practices-with-Student-Outcomes.pdf (as visited November 2, 2015) (research study finding that positive cross-racial interactions in college positively affect students' ability to work cooperatively with diverse people, discuss and negotiate difficult issues, and engage in perspective taking); Victor B. Saenz et al., *Factors Influencing Positive Interactions Across Race for African American, Asian American, Latino, and White College Students*, 48 RES. HIGHER EDUC. 1, 35-36 (February 2007) (cross-campus longitudinal research study concluding based on survey data that "the presence of diverse peers, along with opportunities for facilitated interactions that expand student knowledge about diverse others, perspectives and backgrounds, contributes to the development of important skills."); Mitchell J. Chang et al., *Cross-Racial Interaction Among Undergraduates: Some Consequences, Causes, and Patterns*, 45 RES. HIGHER

EDUC. 529, 535-36 (August 2004) (noting correlation between campus diversity and higher intellectual ability, social ability, and civic interest among students); Jeffrey F. Milem, *The Educational Benefits of Diversity: Evidence from Multiple Sectors*, *in* COMPELLING INTEREST: EXAMINING THE EVIDENCE ON RACIAL DYNAMICS IN COLLEGES AND UNIVERSITIES 130-31 (Mitchell J. Chang et al. eds., 2003) (finding that campus diversity facilitated higher-order thinking skills, less racial stereotyping and more comfortable living, working, and socializing in integrated settings); Anthony Lising Antonio, et al., *Effects of Racial Diversity on Complex Thinking in College Students*, 15 PSYCHOL. SCI. 507, 508-09 (2004) (finding that the presence of minority collaborators increased "integrative complexity," defined as "the degree to which cognitive style involves differentiation and integration of multiple perspectives and dimensions.").[3]

This exposure to diverse cultures and experiences not only enriches the education of students, but also prepares them for a pluralistic democracy by creating cross-cultural understanding and an openness to new viewpoints. As this Court has recognized, the importance of diversity in education transcends the classroom and even the university campus. Justice Powell noted in *Bakke*, and this

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[3] There are of course benefits to the diverse students as well when they are admitted to selective institutions. *See, e.g.*, Michael N. Bastedo & Ozan Jaquette, *Running in Place: Low-Income Students and the Dynamics of Higher Education Stratification*, 33 EDUC. EVALUATION & POL'Y ANALYSIS 318, 319 (2011) (noting the substantial benefits for students attending selective institutions, including higher economic returns after graduation).

Court later reaffirmed in *Grutter*, that "nothing less than 'the nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." *Grutter*, 539 U.S. at 324 (quoting *Bakke*, 438 U.S. at 313 (opinion of Powell, J.)).

In the *amici's* experience, Justice Powell's words rang true when written, and they ring true today. Through its partnerships with a diverse range of racial and ethnic groups, including the NAACP, La Raza, and many other similar organizations, AJC has encouraged cross-cultural engagement and understanding. These efforts have been successful in advancing AJC's goals of eliminating anti-Semitism and other bigotry. AJC's relationship with the African-American community has been particularly fruitful, resulting in nearly one-hundred years of coalitional initiatives to promote civil rights for African-Americans. *See* American Jewish Committee, AFRICAN AMERICAN – JEWISH RELATIONS: AN AJC HISTORY, *available at*: http://www.ajc.org/site/apps/nlnet/content3.aspx?c=7oJILSPwFfJSG&b=8451903&ct=12484857 (as visited November 2, 2015). And these relationships are mutually beneficial: since 1982, AJC's Project Interchange has brought nearly 6,000 diverse world leaders from over eighty-five countries to Israel for weeklong seminars that introduce them to Israeli society and the unique issues faced by Jews in Israel. Project Interchange Website, http://projectinterchange.org (as visited November 2, 2015).

Without individuals open to diverse viewpoints and willing to accept new cultures because of their continued exposure to racial, ethnic, national, and

other differences, such initiatives are severely hampered. Diverse college and university campuses provide precisely the learning environment essential to instilling intellectual curiosity, cross-cultural acceptance, and sensitivity and tolerance to differing points of view. College and university campuses are a breeding ground for future local and national leaders, and depend upon "'a robust exchange of ideas'" "to achieve a goal that is of paramount importance in the fulfillment of [their] mission." *Bakke*, 438 U.S. at 312-13 (opinion of Powell, J.) (quoting *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967)); *see also Grutter*, 539 U.S. at 329 ("Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School's proper institutional mission."); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) ("[E]ducation is the very foundation of good citizenship.").

Social science research supports this point. For example, one longitudinal field study of two student groups, one group comprising students that had taken a course focusing on intergroup dialogue, and a second group that had not taken that course, demonstrated, among other findings, that students exposed to intergroup dialogue more frequently expressed democratic sentiments, showed greater motivation toward taking the perspective of others, became more mutually involved with other groups, and expressed a greater sense of commonality in values than the control group. Patricia Gurin et al., *The Benefits of Diversity in Education for Democratic Citizenship*, 60 J. SOCIAL ISSUES 17, 21-24 (2004). Other academic research, called for by the College

Board following the *Grutter* decision, has echoed these findings. *See* EMILY J. SHAW, COLLEGE BOARD RESEARCH REPORT NO. 2005-4: RESEARCHING THE EDUCATIONAL BENEFITS OF DIVERSITY 21 (2005), *available at* https://research.collegeboard.org/sites/default/files/publications/2012/7/researchreport-2005-4-researching-educational-benefits-diversity.pdf (as visited November 2, 2015) (summarizing research on the benefits of educational diversity and calling for new work in the area).

The undeniable implication of this research is that educational diversity serves an important function in our society. Many critical social, governmental, and business initiatives, such as those undertaken by pluralistic organizations like the *amici*, involve building coalitions of a wide variety of individuals, groups, ideas and viewpoints. Without the foundation of a diverse college campus, these initiatives will suffer. The *amici* therefore request that this Court reaffirm the holding of *Grutter* that diversity constitutes a compelling state interest that may justify carefully constructed race-conscious admissions policies.

C. Race Is An Important Factor In Evaluating How An Applicant Will Contribute To Educational Diversity.

Like many other characteristics of a college applicant, such as family composition, involvement in extracurricular activities, and the quality of his or her high school, race may help predict the contributions the applicant will make to the university community, and ultimately to the pluralistic society the student will enter after graduation. Among researchers, there is little doubt

about "differences in culturally related experiences of students from different racial and ethnic groups, especially in family, community, and peer settings." THE COLLEGE BOARD, REACHING THE TOP: A REPORT OF THE NATIONAL TASK FORCE ON MINORITY HIGH ACHIEVEMENT 17 (1999), *available at* https://research.collegeboard.org/sites/default/files/publications/2012/7/misc1999-3-reaching-the-top-minority-achievement.pdf (as visited November 2, 2015). A scholar previously at the Harvard Graduate School of Education has written that "[s]tructural and cultural forces combine in complex ways to influence the formation of individual and collective identities." Pedro A. Noguera, *The Trouble with Black Boys: the Role and Influence of Environmental and Cultural Factors on the Academic Performance of African-American Males*, HARV. J. AFR. AM. PUBLIC POL'Y 23, 31 (Summer 2001).

The race discrimination and race consciousness experienced by a minority student in our society can be a singularly formative experience for that applicant that will directly impact what insights he or she will bring to the classroom and the campus. This Court acknowledged as much in *Grutter*: "Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters." *Grutter*, 539 U.S. at 333. Justice O'Connor similarly reflected on the unique perspective that Justice Thurgood Marshall brought to this Court, particularly with respect to racial issues, by virtue of his own experiences. *See* Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*,

44 STAN. L. REV. 1217, 1220 (1992) ("Even now, I still think about Justice Marshall's backhanded response, wondering how one confronts, as he did, the darkest recesses of human nature-bigotry, hatred, and selfishness-and emerge wholly intact.").

Part of these experiences, for some students, includes overcoming racial discrimination. Judge Harry T. Edwards eloquently remarked:

> Because of the long history of racial discrimination and segregation in American society, it is safe to assume that a disproportionate number of blacks grow up with a heightened awareness of the problems that pertain to these areas of the law. Of course, not all blacks have the same exposure to these problems . . . . And not all blacks share the same views on the solutions to the problems. But, just as most of my Jewish colleagues have more than a fleeting understanding of anti-Semitism, the Holocaust, and issues surrounding Israel and Palestine, most blacks have more than a fleeting understanding of the effects of racial discrimination.

HARRY T. EDWARDS, RACE AND THE JUDICIARY, 20 YALE L. & POL'Y REV. 325, 328 (2002).

Minority students bring certain of these experiences into the classrooms, cafeterias, and dormitories, adding vital and unique points of view that are translated to his or her peers. *See Bakke*, 438 U.S. at 312-13 n.48 ("[A] great deal of learning occurs informally. It occurs through interactions among students of both sexes; of different races,

religions, and backgrounds . . . who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world."). The other students learn and benefit from being exposed to and understanding these experiences and viewpoints. *See Grutter*, 539 U.S. at 330 (noting the "real" benefits of diversity, as "the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints").

This is not to say that all African-Americans or members of other minority groups experience overt discrimination or will bring a uniform perspective, but that a student from another racial background inevitably will be unable to provide the same type of perspective. This Court has recognized precisely this fact in cases underscoring the need to include African-Americans and women in the jury pool. *See Peters v. Kiff*, 407 U.S. 493, 503-04 (1972) (explaining that the effect of excluding African-Americans from the jury "is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable"); *see also Ballard v. United States*, 329 U.S. 187, 193-94 (1946) (rejecting the argument that an all-male jury was representative because the reality was that neither men nor women act as a single class, and the two sexes are not fungible).

Simply put, race may be a critical component of a college applicant's experience and character that should not be completely ignored. Only by considering race in some circumstances can a

university build the diverse campus that prepares its students for a pluralistic society and lessens bigotry.

II. This Court Should Reaffirm *Grutter*'s Holding That Individualized, Race-Conscious Admissions Are Narrowly Tailored To Achieve Educational Diversity.

UT's narrow consideration of race fits the constitutional purpose announced in *Grutter* and reaffirmed in *Fisher I* of understanding what the applicant could contribute to the learning community. For some applicants, race inevitably will be an integral part of their experience and thus important to what they may contribute to the campus environment. But UT considers race for only a "small fraction" of applicants, with the bulk of the applicants reviewed under race-neutral criteria. *See Fisher v. Univ. of Texas at Austin*, 758 F.3d 633, 646 (5th Cir. 2014). As the Fifth Circuit noted, this indicates that UT's use of race in admissions is narrowly tailored—and is far more narrow than the plan approved by the Court in *Grutter*, in which race was considered for 100% of the applicants. *Id.* at 654, 659.

In determining the experiences that an applicant will bring to the university community, admissions officers should not be forced to ignore race. Overlooking such a fundamental aspect of an individual's experience during a comprehensive holistic review would restrict the University of Texas's ability to apply its educational judgments in determining the appropriate diverse composition of its class—a complex judgment that lies outside the Court's expertise. *See Grutter*, 539 U.S. at 328.

A. The University Of Texas's Holistic *Grutter*-Modeled Admissions Policy Is Not A Quota.

As this Court explained in *Grutter*, "Properly understood, a 'quota' is a program in which a certain fixed number or proportion of opportunities are 'reserved exclusively for certain minority groups.'" *Grutter*, 539 U.S. at 335 (quoting *J.A. Croson Co.*, 488 U.S. at 496); *see also Sheet Metal Workers' Int'l Assoc. v. EEOC*, 478 U.S. 421, 495 (1986) ("[Quotas] impose a fixed number or percentage which must be attained, or which cannot be exceeded.") (O'Connor, J., concurring in part and dissenting in part) (internal quotation mark omitted). Distinct from a quota is "a permissible goal . . . [which] require[s] only a good-faith effort . . . to come within a range demarcated by the goal itself." *Grutter*, 539 U.S. at 335 (internal quotation mark omitted). The distinction between unconstitutional quotas and permissible goals is commonplace in this Court's affirmative-action jurisprudence. *See, e.g.*, *Grutter*, 539 U.S. at 324-25; *Bakke*, 438 U.S. at 314.

Unlike a quota or racial balancing plan, UT's individualized review tracks almost exactly the Harvard plan cited approvingly by Justice Powell, *Bakke*, 438 U.S. at 316–17, as well as the University of Michigan plan upheld in *Grutter*. 539 U.S. at 337. Within the individualized approach used for Texas residents, the University of Texas employs an academic index and a personal achievement index. *Fisher*, 758 F.3d at 638. The personal achievement score is based on a holistic review of the applicant's entire file by members of the admissions staff. *Id.* The review assesses an applicant's "demonstrated

leadership qualities, extracurricular activities, honors and awards, essays, work experience, community service, and special circumstances, such as the applicant's socioeconomic status, family composition, special family responsibilities, the socioeconomic status of the applicant's high school, and race." *Id.*

The University of Texas does not give an automatic "plus" because of the applicant's race. In fact, none of the elements evaluated in the holistic review is considered individually, and UT does not assign any numerical value to any component considered in forming the personal achievement score, including race. *Fisher*, 758 F.3d at 638. This is consistent with *Grutter*'s approval of a race-conscious admissions program, which "considers race as one factor among many, in an effort to assemble a student body that is diverse in many ways broader than race." *Grutter*, 539 U.S. at 340. And the fact that race is only one of many factors that make up a personal achievement index—including diversity factors like socioeconomic status and family composition—further shows that the UT plan does not harm nonminority applicants. *Id.* at 338-39.

Given the subjective nature of the *Grutter* standard, some *amici* have raised concerns that university admissions officers could use holistic review programs and the concept of critical mass to mask racial quotas. (*See, e.g.*, Center for Individual Rights Br. 12.) This is merely an attempt to retread ground the Court covered in *Bakke*, *Grutter*, and *Fisher I*, but, more importantly, it overlooks the Fifth Circuit's "close scrutiny of the data in this record" to ensure that UT's program "does not, as claimed,

function as an open gate to boost minority headcount for a racial quota." *Fisher*, 758 F.3d at 646. The Fifth Circuit conducted the searching inquiry that *Grutter* and *Fisher I* require, ensuring that *amici*'s concern about hidden quotas here is misplaced. Because UT considers "'all pertinent elements of diversity,' it can (and does) select nonminority applicants who have greater potential to enhance student body diversity over underrepresented minority applicants." *Grutter*, 539 U.S. at 341 (quoting *Bakke*, 438 U.S. at 317 (opinion of Powell, J.)).

B. The Top Ten Percent Plan And Other Race-Neutral Methods Of Achieving Diversity Are Inadequate Substitutes For Individualized, Race-Conscious Admissions.

In determining whether the holistic review policy is narrowly tailored to the University of Texas's compelling interest in educational diversity, one should first consider the students admitted through the race-neutral Top Ten Percent plan. As discussed previously, the vast majority of students admitted to UT are selected through the race-neutral Top Ten Percent plan, whereas less than 20% of students are admitted through the holistic review policy. *Fisher*, 758 F.3d at 654. Thus, from the outset, UT's policy is narrower than the plan the Court approved in *Grutter*, which considered every single applicant's race throughout the application process. 539 U.S. at 318.

But the Top Ten Percent plan by itself is insufficient to fulfill UT's interest in educational diversity. The holistic review process is an essential

component of UT's overall plan to ensure a rich and diverse educational environment—allowing UT to individually assess applicants in a way that an objective admissions policy does not. *See Fisher*, 758 F.3d at 653, 656. Several social science studies have concluded that "percent plans are inferior alternatives to affirmative action as a strategy to diversify college campuses." MARTA TIENDA ET AL., AFFIRMATIVE ACTION AND THE TEXAS TOP 10% ADMISSION LAW: BALANCING EQUITY AND ACCESS TO HIGHER EDUCATION, 18 (February 2008), *available at* http://theop.princeton.edu/reports/wp/affirmativeaction_topten.pdf (as visited November 2, 2015); *see also* Jessica S. Howell, *Assessing the Impact of Eliminating Affirmative Action in Higher Education*, 28 J. OF LAB. ECON. 113, 113 (2010) (statistical study finding that a nationwide mandate of race-neutral admissions policies would decrease black and Hispanic representation at all colleges and universities by two percent, and minority representation at most selective four-year institutions by ten percent); Angel L. Harris & Marta Tienda, *Hispanics in Higher Education & the Texas Top Ten % Law*, 4 RACE & SOC. PROBL. 57, 65-66 (2012) (finding that application and admission rates for Hispanic students declined when the Top Ten Percent plan operated without race-conscious admissions); Mark C. Long, *College Applications and the Effect of Affirmative Action*, 121 J. OF ECONOMETRICS 319, 340-41 (2004) (concluding that minority students shifted SAT score reports to lower quality colleges after higher caliber schools eliminated affirmative action plans while white and Asian-American students did the opposite); Sean F. Reardon, Rachel Baker & Daniel Klasik, *Race,*

Income, and Enrollment Patterns in Highly Selective Colleges, 1982-2004, Stanford Univ. Ctr. for Educ. Policy Analysis (2012), available at http://cepa.stanford.edu/sites/default/files/race%20income%20%26%20selective%20college%20enrollment%20august%203%202012.pdf (as visited November 2, 2015) (admitting the top ten percent of high school classes nationwide to highly-selective colleges would not increase minority enrollment at those colleges). One study concludes that minority and low-income students who are admitted pursuant to the Top Ten Percent law often face difficulties enrolling at UT. *See* Tienda et al., AFFIRMATIVE ACTION, *supra*, at 18.

Additionally, there are reasons to believe that, despite the matriculation of some minority students pursuant to the Top Ten Percent plan, such a plan is less effective than individualized determinations in achieving educational diversity. As this Court held in *Grutter*, percentage plans "may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university." 539 U.S. at 340. The Top Ten Percent plan indiscriminately admits a number of minorities without considering the unique ways in which an individual's race may have affected his or her experiences. *See Fisher*, 758 F.3d at 656 (noting minority applicants are not "fungible commodities that represent a single minority viewpoint").

The University of Texas has an interest in diversity that encompasses "a far broader array of qualifications and characteristics" of which race is an important element. *Id.* at 642. This broad array

creates an atmosphere of "speculation, experiment and creation" that is essential to higher education. *Id.* Similarly, in *Grutter*, this Court explained that one benefit of a race-conscious policy that admits a variety of minorities is to break down stereotypes that all minorities are the same. 539 U.S. at 332-33.

Although the Top Ten Percent plan does admit minorities, it does not account for qualitative differences among minority applicants, thus leaving a gap in the admissions process. *Fisher*, 758 F.3d at 651. This concern is particularly salient in Texas, where many public schools are highly segregated. *Id.* at 652 (noting that in the Texas public school system, "[o]ver half of Hispanic students and 40% of black students attend a school with 90%-100% minority enrollment"). Unfortunately, a significant disparity in quality of education still exists between the segregated and integrated schools. *Id.* at 652-53. The Top Ten Percent plan overlooks many minority students from less-segregated schools, even though they have higher standardized test scores than those who are automatically admitted from segregated schools, *id.* at 647, and they have unique experiences that would contribute to UT's educational diversity that class rank cannot measure. *Id.* at 653. UT's holistic admissions program is necessary to admit minority students from different backgrounds to both combat stereotypes and foster a community composed of students with unique perspectives.

In contrast, Petitioner seeks to turn the concept of educational diversity into a simple numbers game where a university achieves "critical mass" when the number of admitted minority students meets some prescribed quota. (Pet'r Br. 46.) When Petitioner

made this same argument to the court below, the Fifth Circuit wisely pointed out that this Court has explicitly disclaimed such an approach to "critical mass." *See Fisher*, 758 F.3d at 656 ("[A]s *Grutter* teaches, an emphasis on numbers in a mechanical admissions process is the most pernicious of discriminatory acts because it looks to race alone, treating minority students as fungible commodities that represent a single minority viewpoint."). Petitioner is also incorrect when she states that the University's desire for intra-racial diversity is based on stereotypes. It is in fact based on objective demographic information that shows diverse students have had different educational and life experiences based on where and how they grew up and went to school.[4] Further, in some instances, race is inextricably intertwined with the applicant's experiences, such as in the instance of an applicant who has overcome significant racial discrimination or succeeded academically as a minority in a majority-white school. *See Fisher*, 758 F.3d at 653 (noting such experiences demonstrate "qualities of leadership and sense of self"). The Top Ten Percent plan, by itself, cannot provide the unique tailoring

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[4] Petitioner's lack of understanding regarding the unique experiences that minority students can bring to a university community, and the importance of both intra- and cross-racial diversity, is perhaps most obvious when she writes that "wealthy minority students" who attend predominantly white schools "have the *same* experiences and viewpoints as the majority of UT's freshman class. The only difference is their race or diversity." (Pet'r Br. 37.) (emphasis in original). At best, and taken in its most innocent light, this statement is naïve.

that has been praised repeatedly by the Court over the past thirty years.

Moreover, there is, as yet, no race-neutral method that can replace race as a factor that provides insight into the applicant's potential experiences and contributions to diversity. Social scientists have learned that a variety of cultural factors have an impact on the educational experiences of minorities: "the way family members and friends interact with one another and the outside world"; "how much parents talk to their children, deal with their children's questions, how they react when their child learns or fails to learn something"; and "psychological and cultural differences." CHRISTOPHER JENCKS & MEREDITH PHILLIPS, EDS., THE BLACK-WHITE TEST SCORE GAP 43 (1998). According to this research, African-American children, regardless of socioeconomic status, receive less cognitive stimulation and emotional support. *See id.* at 126-27. Yet, "[a] great many students with lower test scores or high school grade-point-averages succeed in college." Brief of Amicus Curiae of the College Board as Amicus Curiae Supporting Respondents, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516), 2003 WL 402218, at *12.

Requiring universities to eliminate holistic review like that in the UT admissions program in favor of purely objective criteria would force universities to overlook important cultural issues and would further mire federal courts in managing the intricacies of the college admissions process. *See Fisher*, 758 F.3d at 657 ("We are ill-equipped to sort out race, class, and socioeconomic structures, and *Bakke* did not undertake to do so. To the point, we are ill-equipped

to disentangle them and conclude that skin color is no longer an index of prejudice; that we would will it does not make it so.").

This approach would involve perennially adjudicating disputes about "objective" factors for merit: Is the quality of an applicant's high school an objective, academic factor? Are factors such as socioeconomic status and geographic location truly objective and academic?[5] If not, do academic institutions have any ability to recognize the special achievements and qualities of those applicants who excelled despite these and other potential hurdles to academic achievement?

Additionally, eliminating the consideration of socioeconomic status from the PAI score, as Petitioner suggests, would force UT to limit the type of diversity it seeks. The holistic review system's consideration of socioeconomic status is not "at war"

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[5] To the extent that these factors have historically been labeled "race neutral," recent census data and academic research casts some doubt on this classification. *See, e.g.*, UNITED STATES CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2014 TABLE 3, *available at* https://www.census.gov/content/dam/Census/library/publications/2015/demo/p60-252.pdf (as visited November 2, 2015) (socioeconomic status may be correlated with race because 26.2% of African Americans but only 10.1% of non-Hispanic whites are below the poverty line); JOHN LOGAN ET AL., THE PERSISTENCE OF SEGREGATION IN THE METROPOLIS: NEW FINDINGS FROM THE 2010 CENSUS 3, *available at* http://www.s4.brown.edu/us2010/Data/Report/report2.pdf (as visited November 2, 2015) (geographic location may be correlated with race because "whites live in neighborhoods with low minority representation" and blacks "live in neighborhoods with high minority representation, and relatively few white neighbors").

with the University of Texas's need to enroll more minority applicants from high-performing high schools. (Pet'r Br. 40 n.7). Instead, this policy demonstrates UT's commitment to creating an academic community that is diverse along multiple dimensions. Just as not all minorities have had the same life experiences, *Fisher*, 758 F.3d at 656, not all economically disadvantaged students have had the same life experiences. Thus, that many minority students admitted through the Top Ten Percent plan come from an economically disadvantaged background does not mean the remaining applicants' economic statuses are irrelevant. Instead, this is yet another way to place an individual's application in context of his or her unique life experiences. Under Petitioner's suggested alternative, UT would be forced to ignore many relevant aspects of various applications with the speculative hope that this may lead to more intra-racial diversity. Such a policy would ultimately frustrate UT's goal of obtaining diversity by limiting the amount of information available to conduct an individualized review of each applicant. *Id.* at 660 (noting the University's "search for students with a range of skills, experiences, and performances . . . [would] be impaired by turning a blind eye to the differing opportunities offered by the schools from whence they came").

There is no practical much less realistic alternative that would allow UT to identify applicants who, for example, lived through the peer effects of being an academically successful minority. While it may be possible for the UT to create a very lengthy application that asks detailed questions about the applicant's characteristics and experiences, and thus avoids explicitly any consideration of race,

a university is not required to exhaust "every conceivable race-neutral alternative." *Grutter*, 539 U.S. at 339. In addition, this Court historically has been adverse to directly managing the affairs of a university, which would be necessary only if an "objective" application process were allowed. *See Bakke*, 438 U.S. at 312 (noting who may be admitted to study is one of the "four essential freedoms" of a university and that safeguarding these freedoms is "[o]ur national commitment"); *Grutter*, 539 U.S. at 328 (explaining the Court's holding "is in keeping with our tradition of giving a degree of deference to a university's academic decisions" to take "into account complex educational judgments in an area that lies primarily within the expertise of the university").

UT has given "serious, good faith consideration" to workable race-neutral alternatives. *Fisher*, 758 F.3d at 649. It uses race-neutral processes to admit the vast majority of its students, employing a race-sensitive process for only the narrowest of circumstances in the narrowest possible manner: to evaluate the unique experiences of a specific applicant and place that applicant's achievements in context. UT has shown there is no other race-neutral alternative that can similarly achieve this goal, much less achieve the goal in a superior manner. The University of Texas's narrow use of race in these circumstances is thus constitutional.

C. UT's Holistic Review Program Is Not Invidious Discrimination.

Some *amici* argue that UT's policy results in "invidious" discrimination, comparing the effect of UT's race-conscious admission policy on Asian Americans to the Jewish quotas of the 1920s and

suggesting that Asian Americans are "the New Jews." (Asian American Legal Foundation Br. 10, 23.) This erroneous comparison—based on the premise that UT is conducting some form of "racial balancing"—misses the mark.

First, not even Petitioner argues that UT is attempting to conduct "racial balancing" via the holistic review plan or that UT's holistic review plan is mere pretext for intentional racial discrimination. As this Court recognized in *Grutter* and affirmed in *Fisher I*, a plaintiff bears the burden of placing the validity of a university's adoption of an affirmative action plan in issue, and it is insufficient merely to speculate that universities employ holistic review as a pretext for discrimination. *See Grutter*, 539 U.S. at 329; *Fisher*, 133 S.Ct. at 2420-21; *see also Bakke*, 438 U.S. at 319 n.53 ("Universities . . . may make individualized decisions, in which ethnic background plays a part, under a presumption of legality and legitimate educational purpose."). Of course, the judiciary should ensure the academic decision to use a race-conscious admission policy is supported by "a reasoned, principled explanation," affording deference to the university's "experience and expertise." *Fisher*, 133 S.Ct. at 2419 (internal quotation marks omitted); *Grutter*, 539 U.S. at 329. UT has provided such a reasoned, principled explanation for its policy, and Petitioner—and her *amici*—have not shown that the policy is pretext for the University to discriminate against any particular group.

Second, UT's holistic review policy and the historical discrimination Jewish applicants faced in the early Twentieth Century are entirely dissimilar. As this Court clarified in *Fisher I*, strict

scrutiny requires UT to show that its policy considers applicants as individuals and does not employ racial balancing or quotas, which historically have been used to discriminate against minority groups including Jewish applicants. 133 S.Ct. at 2420. Unlike the quotas and anti-Semitic policies certain universities enacted, which specifically targeted Jewish applicants in an effort to limit their placement in colleges and universities, there is no evidence that the University of Texas has used its race-sensitive admissions policy, which is designed to achieve diversity, to exclude or limit matriculation for any racial group. The University has never established any specific number or percentage of minority enrollment it seeks to attain, nor does it award points to students from any particular racial or ethnic background. As the Fifth Circuit explained:

> The numbers support UT Austin's argument that its holistic use of race in pursuit of diversity is not about quotas or targets, but about its focus upon individuals, an opportunity denied by the Top Ten Percent Plan. . . . UT Austin urges that it has made clear that looking to numbers, while relevant, has not been its measure of success; and that its goals are not captured by population ratios. We find this contention proved . . . .

Fisher, 758 F.3d at 654. Indeed, roughly 80% of the UT class is admitted on class rank alone, without taking into account race, ethnicity, or religious affiliation. *Id.* at 637.

Given the history of racial quotas in higher education, it is not completely irrational for *amici* to worry that race-conscious admissions could harden into inflexible quota systems. To be sure, if the UT policy on its face, or as applied, discriminated against or set a quota disadvantaging any racial or ethnic group, including Asian Americans, the *amici* would join in objecting to it. Such a policy would indeed be reminiscent of the policies that artificially restricted the number of Jewish applicants admitted to selective universities in the first half of the Twentieth Century. But the record shows that UT's policy does not discriminate against or limit admissions to any particular racial or ethnic group. *Fisher*, 758 F.3d at 654. To the contrary, UT has narrowly crafted a holistic approach fully consistent with and approved by this Court's precedents.

The University of Texas should be allowed to continue to use this holistic process—including race as one among many factors—to allow the University to better judge the applicant's potential contributions to a diverse educational environment. To Justice Powell, such individualized admissions processes were ideal because they allowed institutions to evaluate an applicant's "exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important." *Bakke*, 438 U.S. at 317.

CONCLUSION

American colleges and universities have relied on this Court's guidance in formulating individualized admissions policies for nearly four decades since

Justice Powell's landmark opinion in *Bakke*. In *Grutter* and *Fisher I*, this Court reaffirmed the principles espoused by Justice Powell. Petitioner and her *amici* should bear a heavy burden before persuading this Court to undo the wisdom of those important precedents. The *amici* believe that the role of diversity in education continues to be critical to the Nation. So too is the role of the courts in ensuring these programs remain benign. The program at issue in this case, however, comports with the narrowly-tailored programs this Court has already endorsed. As a result, the *amici* respectfully request that the Court affirm the decision of the Fifth Circuit and uphold UT's admissions policy.

Respectfully submitted,

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